(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 10 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a pediatric interventional radiologist at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on November 16, 2011. In an accompanying statement, counsel stated that the petitioner's work produces national benefits because "[h]is role as a radiologist extends beyond merely attending to a small community of patients. . . . He has had his [research] work published in journals and presented at conferences that are national and even international." Counsel asserted that the petitioner "is very well-known for his diagnostic ability" and other "clinical skills that cannot be objectively quantified." Counsel asserted that to hold the petitioner to the labor certification requirement could "greatly . . . harm" the national interest, "because this process is not able to take into consideration the unique skills that [the petitioner] has developed as a radiologist, the tremendous

national impact of the research that he had done, and the reputation that [he] has sustained amongst his peers nationally."

The petitioner submitted a copy of his employment contract with and an accompanying job offer letter requiring him, as a condition of employment, to apply for a non-tenure-track assistant professor position at where the petitioner had previously served in a fellowship in 2008-2009.

Counsel stated that "[t]estimonials from renowned experts concur that [the petitioner's] expertise and leadership in the field of radiology have set him apart from others." Counsel referred to "attached letters of support from independent experts nationwide," but all four of the initial letters are from

associate professor at and chief of radiology and diagnostic imaging at stated that the petitioner's "credentials as a specialist in his specialty field are unsurpassed – his contributions to this prominent health center and research institution, advances to the field of radiology through his original research, and reputation he has developed, make him a leading physician in his field." provided no details about the petitioner's research or why it is important.

, stated that the petitioner "has distinguished himself as a leading member of this hospital and radiology community." asserted that the petitioner "has contributed significantly to the field through his novel publications," but did not elaborate, focusing instead on the petitioner's "rare expertise" in "relatively new" medical technologies. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. 221 (footnote omitted).

made a similar assertion, stating that the petitioner "has the rare ability to perform the most innovative invasive and non-invasive diagnostic and therapeutic interventional radiology procedures, and also to teach these procedures." did not claim that the petitioner invented, developed, or improved upon these procedures, only that the petitioner learned them. also asserted that the petitioner's "unique expertise gives him the ability to make diagnoses that the vast majority of non sub-specialized peers would have overlooked." This wording suggests that sub-specialization affords the necessary expertise. There exists no blanket waiver based on specialty or sub-specialty. Specialization, by definition, includes knowledge and abilities not widely shared outside a given specialty. This fact is not facially a basis for the waiver.

associate professor at stated that the petitioner "is performing outstanding research in areas which few specialists have expertise in, thus making him extremely unique; and it is vital that he continues his innovative research." did not describe this research

or explain its importance. asserted that the petitioner received a "variety of awards from . . . prestigious settings where all personnel and participants are extremely well-qualified." identified some specific examples, most of which are not awards, such as the petitioner's "medical degree from as well as coveted positions with

The only award that specified that would be identifiable as an award was the ' title that stated the petitioner earned for The record contains no other information about this claimed award, except for the petitioner's own assertion that "[t]his award is given to the best fellows or residents in the hospital to recognize their excellent work ethic, patient care abilities and excellence in their field of specialization." The petitioner spelled the name It is not clear which is the correct spelling, as the AAO can find no first-hand documentation of the claimed award in the record. Likewise, the record does not appear to contain any evidence of the award's significance outside of the Vascular and Interventional Radiology Department at

The petitioner and some witnesses asserted that there is a shortage of physicians in the petitioner's specialty. The AAO will address this issue further below.

The petitioner submitted copies of two case reports that he co-wrote: As case reports, these articles report novel information from individual patient cases, rather than the outcome of original research. A printout from the Google Scholar search engine identified 24 citations of the 2005 article. This single cited article does not establish a consistent or ongoing pattern of influential publications by the petitioner. Both articles date from the petitioner's time in The record does not indicate that the petitioner had authored any other published articles during the seven and a half years between the article's submission for publication in April 2004 and the filing of the petition in There is, therefore, no indication that the petitioner's work at has produced, or will produce, further work for journal publication.

As evidence of "ongoing research," the petitioner submitted documentation of "the first step" in two "Human Research Application[s]," both dated These materials identify the petitioner as a "co-investigator" on two projects that appeared to be in the preliminary stages as of the petition's filing date. It would be premature to conclude, based on these not-yet-approved applications, that the research projects qualified the petitioner for the waiver. The initial evidence did not indicate that the projects had been cleared to proceed, let alone that those projects were especially significant. Participation in medical research is not, by itself, presumptive grounds for granting the waiver.

The director issued a request for evidence on April 10, 2012. The director instructed the petitioner to submit documentary evidence to "establish . . . a past record of specific prior achievement with some degree of influence on the field as a whole."

In response to the notice, counsel stated: "the Department of Labor has recently held in several prevailing wage requests that where a physician will provide patient care, education, and research, that this constitutes a combination of occupations, which is deemed inappropriate for labor certification." Counsel submitted no evidence and cited no sources to support this claim, and did not show that the Department of Labor had denied labor certification applications (as opposed to and as distinct from prevailing wage requests) for the reason identified.

In a new statement, the petitioner stated: "I believe my research work has been practically very important to the medical community in that it has changed practice at my institution and other places as well in the field of vascular malformations." The petitioner was the co-author of a article on vascular malformation, but the record does not show the extent to which the petitioner's work "has changed practice" with regard to such malformation.

The petitioner also stated: "My new research project, (which I have undertaken recently) involves treatment of solid tumors in children nonsurgically by using magnetic resonance guided high intensity focused ultrasound." The petitioner claimed no existing contributions in this area. Rather, he stated: "Research on this method is still in its infancy and I hope that . . . I can make revolutionary contributions to treatment of childhood cancers." Absent evidence of significant past contributions by the petitioner in this area, there is no way to judge whether the petitioner's expectations about his future research are realistic.

Counsel stated that the petitioner "has already submitted numerous letters . . . from independent evaluators who have never worked with [him]." Counsel did not identify the "independent evaluators." All of the witness letters in the initial submission were from individuals at Their letters were not first-hand evidence of wider impact or influence.

Two additional letters accompanied the petitioner's response to the request for evidence. and Radiology, asserted that the petitioner "is at the forefront of the radiology community with his clinical work," and that, "with less than 50 pediatric interventional radiologists trained in the United States," "[t]he shortage of highly qualified pediatric and pediatric interventional radiologists is critical." As will be discussed further below, a shortage of qualified physicians is grounds for a national interest waiver, but only if the petitioner meets a series of conditions that, in the present proceeding, the petitioner has not attempted to meet.

The other letter, dated March 7, 2012, bears the electronically reproduced signature of Apart from biographical details about the text of this letter is identical to that of November 14, 2011 letter that accompanied the initial filing of the petition.

submitted purportedly as independent testimony, has no weight in this regard considering that exactly the same claims appeared in an earlier letter from one of the petitioner's colleagues at

The use of identical wording indicates that the language in the letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The director denied the petition on acknowledging the intrinsic merit of the petitioner's profession but finding that the petitioner had not established that the benefit from his intended work would be national in scope. The director also concluded that the petitioner had not established a track record of influential accomplishment in his field. The director acknowledged the petitioner's published work, but stated: "Published research alone cannot serve to set the petitioner apart from available U.S. workers with the same minimum qualifications."

Substantial portions of counsel's statement on appeal repeat, verbatim, the earlier response to the request for evidence. These sections predate the denial notice and therefore do not address it.

Regarding the petitioner's published work, counsel states: "We assert that no publications is the norm for Physicians and [the petitioner's] publication rate is voluminous by any standard in comparison to the minimally qualified physician." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel correctly asserts that a "physician" is not the same thing as a "medical researcher," but the petitioner's two published articles do not document medical research. Rather, they are case reports, through which physicians report their own clinical experiences. Furthermore, even if the petitioner produced more articles than other physicians at academic institutions, it would not necessarily follow that the petitioner's published work was especially influential in the field.

Counsel points to the previously submitted citation information. As noted previously, the citation data relates to a single article prepared in early and the record does not indicate that the petitioner has produced any cited published work since then. There is no basis to assume that the petitioner is on the verge of producing widely cited publications.

Counsel repeats that the petitioner submitted "independent testimonials from prominent members of the field," but only one witness was from outside and the letter from that witness was an almost exact copy of an earlier letter from one of the petitioner's co-workers.

The record does not adequately support claims that the petitioner is an influential figure in his field. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The petitioner has not established, by

preponderance of evidence, that he qualifies for a national interest waiver of the statutory job offer requirement under the terms set forth in *NYSDOT*. Therefore, the AAO will dismiss the appeal.

The AAO notes that the petitioner is the beneficiary of a second Form I-140 petition, seeking the national interest waiver on his behalf as a physician in a medically underserved area under the provisions of section 203(b)(2)(B)(ii) of the Act. The intending employer filed the petition on June 25, 2012, and the director approved the petition or Therefore, the alien in this proceeding is already the beneficiary of an approved petition in the same immigrant classification that he seeks in the present proceeding. The AAO further observes that section 203(b)(2)(B)(ii) of the Act, and the implementing regulations at 8 C.F.R. § 204.12, deal with an alternative avenue to the waiver specifically tailored to physicians. Approval of the waiver under those terms does not imply that the petitioner is also eligible for the waiver under the separate guidelines set forth in *NYSDOT*. The 2012 petition, unlike the 2011 petition on appeal here, contained information and evidence to meet the provisions for the physician waiver; it did not rest on the bare assertion that a shortage exists.

ORDER: The appeal is dismissed.